United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-7134

To be argued by
Harold L. Warner, Jr.

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United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

Plaintiffs-Appellees,

-against-

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

On Appeal from an Order of the United States District Court
for the Southern District of New York

REPLY BRIEF OF DEFENDANT-APPELLANT TRANS WORLD AIRLINES, INC.

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Appeal No. 77-7134

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REPLY BRIEF OF DEFENDANT-APPELLANT
TRANS WORLD AIRLINES, INC.

This reply is to set in proper focus a few of the many erroneous premises on which appellees' arguments are founded.

This Court has jurisdiction to hear this appeal. The CAB is not administratively powerless. There is every reason why the doctrines of primary jurisdiction and exhaustion of administrative remedies apply to this suit. And reference of this case to the CAB is not a pointless formalism.

At issue is a basic question of national air transportation policy, a decision on which was expressly reserved by this Court in Civil Aeronautics Board v. Modern Air Transport, Inc., 179 F.2d 622 (2d Cir. 1950), where this Court stated that in the suit of a private party to enjoin the operations of a certificated air carrier, such as TWA, "the court may well show an understandable reluctance to control the activities of an air carrier without action by the agency entrusted with its regulation", 179 F.2d at 626.

I

THE ORDER BELOW IS APPEALABLE

In C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir.1974), the Court held that it had jurisdiction to hear an appeal on the issue of whether the doctrine of primary jurisdiction should be invoked. And in Local 771, I.A.T.S.E., AFL-CIO v. RKO General, Inc., WOR Division, ___ F.2d ___ (2d Cir. slip op. March 3, 1977, Docket No. 76-7430), the Court said:

> "The threshold question is whether we have jurisdiction over the Company's appeal from the district court's order which, being interlocutory, does not ordinarily qualify for appeal as a 'final' order under 28 U.S.C. §1291. Its appealability

> therefore turns on whether it satisfies the conditions laid down by the Supreme Court in Cohen v. Beneficial Ind. Loan Corp., 337 U.S. 541, 546 (1949), for appeal in certain exceptional cases from interlocutory orders determining collateral or separable rights that are 'too important to be denied review and too independent of the cause to require that appellate consideration be deferred until the whole case is adjudicated,' 337 U.S. at 546. . . . Under analogous circumstances we have held that an issue regarding the right to trial in a different forum is separable from and collateral to the merits for purposes of applying the Cohen rule. CAB v. Aeromatic Travel Corp., 489 F.2d 251 (2d Cir. 1974) (whether CAB had primary jurisdiction held appealable)". (Slip op. at pp. 2169-2170).

In Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963), the Supreme Court of the United States held that an order denying a motion for change of venue was appealable as a matter of right, stating (371 U.S. at 558):

> "Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceeding".

An issue regarding the right to trial in a different forum is separable from and collateral to the merits for the purposes of applying the Cohen rule. To be avoided is the situation where protracted litigation "comes to an abrupt

end on an issue directly presented to this Court nearly eight years ago but not decided". Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 390 (1973) (Burger, C.J., dissenting).

II

THE CAB IS NOT POWERLESS

At pp. 8, 33-34 of their brief, appellees argue that "The CAB is administratively powerless to do more than issue an after-the-fact order to cease and desist".

Such is not the fact. As pointed out in TWA's main brief, the CAB's Rules of Practice specifically permit a motion for suspension of operating authority, pendente lite, 14 C.F.R. § 302.2[illegible].

III

THERE IS EVERY REASON WHY THE DOCTRINE OF PRIMARY JURISDICTION SHOULD BE INVOKED IN THIS CASE

At page 8 of their brief, appellees argue that "There is no reason why a federal court should refuse to hear this case on the merits."

On the contrary, as outlined in TWA's main brief, pp. 7-22, this case presents a classic illustration of when the doctrine of primary jurisdiction should be invoked by a district court.

Furthermore, all that is involved in this case is the alleged violation of a regulation of the CAB. Only the CAB or the Secretary of Transportation may sue under § 1007(a) of the Act for the alleged violation of a regulation of the CAB. A private party, such as plaintiffs, may sue under § 1007(a) only "in the case of a violation of Section 401(a)" of the Act.

Such was the holding of the Court of Appeals for the Ninth Circuit in DHL Corporation v. Loomis Courier Service, Inc., 522 F.2d 982 (9th Cir. 1975). In so holding, the Court said "that Congress likely had the intent to let a 'party at interest' file suit only where the strict requirements of the statute itself were being violated, leaving to the Board the power to police violations of its own regulations", 522 F.2d at 985.

IV

REFERENCE OF THIS CASE TO THE CAB IS NOT A POINTLESS FORMALISM

At page 9 of their brief, appellees argue that "To refer this case to the CAB against that agency's wish would be a pointless formalism."

What is needed in this case is not the views of the Bureau of Enforcement, appearing here amicus curiae,* but the views of the 5-Member Board as to what the CAB's own regulations mean in this case.

Whether or not an agency wishes a matter referred to its primary jurisdiction, is not dispositive. Even though an agency has for over 15 years declined to assume jurisdiction, a court is "not obliged to honor the Board's disinclination to assume jurisdiction". Pan American Airways, Inc. v. United States, 371 U.S. 296, 328 (1963) (Brennan, J., dissenting).

In Trans-Pacific Airlines Ltd. v. Hawaiian Airlines Ltd., 174 F.2d 63 (9th Cir. 1949), the court took the CAB to task for failure to assume jurisdiction, saying:

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* In its brief amicus curiae to this Court, the Bureau of Enforcement states, p. 2, "counsel is advised that the CAB intends to move to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure, although not necessarily upon the same allegations contained in plaintiffs' complaint", adding "The CAB takes no position as to the merits of the allegations contained in that complaint."

"[I]n view of the widespread discussion of the functions of the administrative process, it may be assumed that Congress intended the administrative body, to proceed to help the courts by making determination and thus give color and life to policy embedded in the text of the Act, before abandoning such controversies to the courts for final settlement on cold, legalistic lines." 174 F.2d at 65.

The court then concluded:

"[P]rior to judicial intervention, problems which involve expert knowledge of multitudinous detail of intricate nature in a technical field require that recourse should be had to administrative bodies. Especially is this true where uniformity of interpretation of rules and consistency in application, in view of an overall policy, is compelled by the legislative mandate. Then is there not only a commitment of primary, but likewise of exclusive, jurisdiction to the administrative, and exhaustion of the remedies is mandatory. Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255." Id. at 66.

See also, Grutka v. Barbour, 549 F.2d 5, 8 (7th Cir. 1977).

The ABC Charter Regulation provides, 14 C.F.R. § 371.10(a) (A 76):

"(a) The charter shall be arranged and sold by a charter operator as an independent principal with respect to the air transportation included in the charter and not as an agent for a direct air carrier. Such charter may, but need not, include ground accomodations and services."

Under Section 371.2 of the ABC Charter Regulations "charter operator" means an "ABC operator" (A 75).

An ABC operator means:

> "(1) any citizen of the United States, as defined in this section (other than a direct air carrier), who is authorized hereunder to engage in the formation of groups for transportation on ABC's in accordance with the provisions of this part; or (2) a foreign charter operator. (A 74).

Thus, under the ABC Charter Regulation any citizen of the United States (other than a direct air carrier) may arrange and sell ABC charters.

TWA is specifically complying with this regulation. TWA is providing the air transportation for ABC charters which are arranged and sponsored by TAS. Although TWA has a series of sales offices and ticket offices coast-to-coast, TWA does not sell tickets for ABC charters to the general public.

A passenger can go to any one of over a thousand retail travel agents in New York City and buy a ticket for an ABC charter to London, merely by making the purchase 45 days in advance. If, as this complaint alleges, there is something wrong with the way TWA is marketing ABC charter air transportation, the 5-Member Civil Aeronautics Board should make plain, in administrative hearings, just what is wrong.

As pointed out on page 3 of TAS' brief, the investigation of the Bureau of Enforcement has been broadened by CAB Order C-208, issued under delegated authority on

March 25, 1977 in Docket 30664. A copy of Order C-208 is attached as Appendix A to TAS' brief.

The purpose of this investigation is to provide the Director of the Bureau of Enforcement with information concerning:

> (a) whether certain air carriers, foreign air carriers, or others have been and are violating provisions of the Act and Board Regulations as described herein; and
>
> (b) whether formal enforcement action, or any other appropriate course of action, should be taken with respect to such violations.

This broadening of the investigation by the Bureau of Enforcement further demonstrates the need to invoke the doctrine of primary jurisdiction in this case in order to secure uniformity in the regulation of charter air transportation. The CAB is the agency entrusted by Congress to regulate the air transport industry. As stated by this Court in Danna v. Air France, 463 F.2d 407, 411 at fn. 14 (2d Cir. 1972), when a case raises "issues of fact not within the conventional experience of judges", and requires "the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over". It is for the 5-Member CAB, not the district courts, to rule in the first instance on how charter air transportation may be marketed.

What this case needs is not the attorney from the Bureau of Enforcement advising the Court that he is

(1) enlarging his present investigation, (2) taking no position on the merits of the present complaint, and (3) considering intervening in the case on a different theory.

What the case does need is an administrative proceeding by the full 5-Member Board so that the regularly scheduled carriers and the general public may know precisely how they may sell and buy ABC charter transportation to Europe.

TWA thinks it understands that it has to sell such transportation by arranging with any citizen of the United States (other than a direct air carrier) to form a group of 40 people (from anywhere) who want to make a round-trip from New York to London (A 74-76). TWA further thinks it understands that it may not itself sell tickets for such transportation, but must let the charter operator and retail travel agents alone make such sales. TWA does not think it is prohibited by the regulation from vigorously advertising the availability of such charter trips. Furthermore, TWA believes that it may deal with any citizen of the United States in chartering its aircraft and is not limited to dealing with industrial giants. If the CAB's ABC and ITC regulations are to be construed as plaintiff would construe them, the regulations are patently unreasonable. The full 5-Member Board should be given an opportunity to construe

the regulations which it "phrased and promulgated". American Airlines, Inc. v. Standard Airlines, Inc., 80 F. Supp. 135, 139 (S.D.N.Y. 1948).

CONCLUSION

The orders of the district court denying defendants' motions to dismiss the complaint should be reversed and the complaint dismissed with costs to appellants.

Respectfully submitted,

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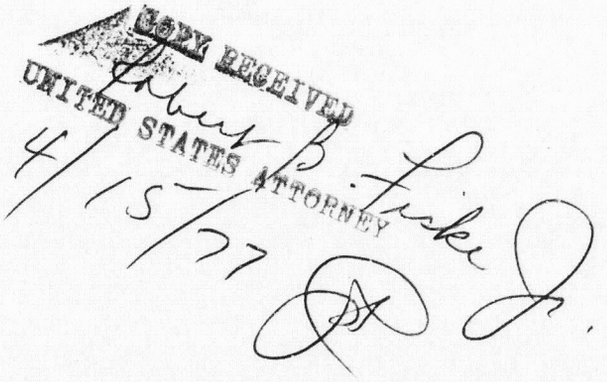
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